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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 592

ARTHUR RUSSELL HOWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 37–41) is reported at 172 F. 2d 213.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1949 (R. 42). The petition for a writ of certiorari was filed February 23, 1949.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

In December 1940, petitioner was convicted of bank robbery in the District Court for the South-

[1] Service was not made until April 4, 1949.

ern District of West Virginia and was sentenced to 20 years' imprisonment. In June 1948, the District Court for the District of Kansas discharged him on habeas corpus on the ground that his trial counsel were not present when the sentence was pronounced and ordered that he be delivered to the trial court for further proceedings. The trial court thereafter denied his motion for a new trial based on the ground that he had been denied process for witnesses at his trial and on allegedly newly discovered evidence, and sentenced him to 20 years' imprisonment, with credit for the time served under the original sentence. The questions are:

1. Whether all the proceedings at the original trial were void because of the adjudication of invalidity of the sentence.

2. Whether the motion for a new trial on the ground of newly discovered evidence was timely and, if so, whether the trial court abused its discretion in denying it.

3. Whether petitioner was entitled to a new trial on the ground that he had been denied compulsory process for witnesses.

STATEMENT

On December 5, 1940, after a jury trial at which he was represented by counsel of his own choice (R. 4, 19, 22–23, 33), petitioner was convicted in the District Court for the Southern District of West Virginia on a charge of bank robbery, and

he was sentenced to imprisonment for 20 years (R. 31). In 1948, he instituted habeas corpus proceedings in the District Court for the District of Kansas attacking the validity of the conviction. On June 24, 1948, the habeas corpus court held that the sentence was void because petitioner's trial counsel were not present when it was pronounced and ordered that petitioner be discharged from custody under the sentence and delivered to the United States Marshal for the Southern District of West Virginia for further proceedings in that court (R. 2, 19–21).

Petitioner was returned to the District Court in West Virginia, where he filed a motion to set aside the verdict and for a new trial on the grounds that he was denied "compulsory attendance for witnesses" and that since his trial new evidence had been discovered which related to and corroborated his alibi (see R. 2, 9). A hearing was held on the motion at which petitioner, who was represented by new counsel, testified that his defense at the trial consisted of an alibi that he was in Columbus, Ohio, on the day that the crime was committed (R. 4), and that one Grace Wendling, who was confined at Alderson Federal Reformatory at the time of the trial, was a witness necessary to his defense and was not produced at the trial despite a court order requiring her attendance (R. 10.)

He also testified that after his trial he had located three narcotic prescriptions, two in his

own name and one in which he used an assumed name, all of which had been filled in Columbus, Ohio, on the date of the robbery (R. 2, 4–9). One of these prescriptions had been filled at a drug store owned by Dudley Horn, who had testified as a defense witness at the trial that it was dated November 13, 1939, the day of the robbery (R. 5, 34–35). However, Horn had not personally filled the prescription and he did not produce it at the trial because the subpoena did not direct him to do so (R. 4–10, 35). At the hearing below, Mrs. Horn, who had filled this prescription, identified a copy of it (R. 13–15), and two other Columbus pharmacists identified prescriptions dated November 13, 1939, which had been filled in their stores. One of these was in petitioner's name, but the pharmacist could not otherwise identify petitioner because he had bought the store after that date (R. 11–13). The third prescription was issued to one James C. Hawkins, a name which petitioner testified he had used (R. 4), but the pharmacist was unable positively to identify petitioner; he could say only that petitioner resembled the man for whom he had filled the prescription (R. 15–17).[2]

One of the attorneys who represented petitioner at his trial in 1940 testified at the hearing and produced a letter he had written to the warden of Alderson reformatory on December 7, 1940, two

[2] At the trial, eye witnesses identified petitioner as one of the robbers (see R. 41).

days after petitioner had been sentenced, in which he explained that he had not required that Grace Wendling be produced at the trial in accordance with the court's prior order to the warden because he had concluded that "her testimony would not be sufficiently valuable to warrant the" expense involved in calling her as at witness (R. 27–29).

The district judge concluded that he was "precluded by the Criminal Rules" (see Rules 29 (b), 33) from entertaining a motion to set aside the verdict and that the only matter for his determination was whether there had been a showing of newly discovered evidence which would be material at a new trial and which if received would probably cause a different result (R. 30). The motion for a new trial was denied, and petitioner was resentenced to a term of 20 years' imprisonment, subject to credit for the time already served on the original sentence (see R. 37). On appeal to the Court of Appeals for the Fourth Circuit, the judgment was affirmed (R. 37–42).

ARGUMENT

1. Petitioner's contention [3] that the absence of his trial counsel at the time sentence was imposed vitiated the trial and verdict is without merit.

[3] The petition for certiorari does not articulate the grounds upon which petitioner seeks review of the judgment below, but we assume his contentions here are the same as he made in the court below (see opinion below, R. 37–38).

The habeas corpus court in Kansas held on the evidence presented to it that the sentence itself was void only because petitioner's counsel were not present when it was pronounced, but that court rejected petitioner's contentions that his constitutional rights were infringed at the trial (see R. 38, 39). The infirmity so found in the proceedings at the time of sentence did not affect the trial and verdict, and the effect is the same as if no judgment had been entered, so that the case remained pending until lawfully disposed of by sentence. *Wilson* v. *Bell,* 137 F. 2d 716 (C. A. 6); *McDonald* v. *Moinet,* 139 F. 2d 939 (C. A. 6), certiorari denied *sub. nom. McDonald* v. *United States,* 322 U. S. 730. This Court has rejected the argument that a prisoner whose guilt is established by a regular verdict may escape punishment altogether because the court committed an error in passing sentence. *In re Bonner,* 151 U. S. 242; *Bozza* v. *United States,* 330 U. S. 160, 166–167. As the court below said (R. 38), petitioner's successful attack upon the judgment of the trial court furnished only a basis for the imposition of a valid sentence and did not invalidate the trial *ab initio. Ruben* v. *Welch,* 159 F. 2d 493 (C. A. 4), certiorari denied, 331 U. S. 814; *De Benque* v. *United States,* 85 F. 2d 202 (C. A. D. C.); *Anderson* v. *Rives,* 85 F. 2d 673 (C. A. D. C.).

2. Petitioner's contention that the district court erred in denying his motion for a new trial on the ground of newly discovered evidence is

equally without merit. In the first place, it was not timely under Rule 33 of the Federal Rules of Criminal Procedure, which provides that such a motion must be made "only before or within two years after final judgment." The resentence in 1948 to cure the infirmity in the sentence imposed in December 1940 did not reinstate the situation existing at that time for all purposes. As the Court of Appeals said (R. 40), it was not the purpose of the rule "to extend the time for making the motion because of a defect in the judgment. A void judgment equally with a valid one would meet the purpose of the rule, which was to fix the time after trial within which the motion should be made; and there would be no sense in permitting the motion after the time so fixed merely because the sentence as entered was technically invalid."

In any event, the district court entertained and overruled the motion on the merits, and its action in that regard is reviewable only for abuse of discretion. It is clear that the court's ruling was proper. The evidence offered as newly discovered was calculated to corroborate petitioner's alibi at the trial that he was in Columbus, Ohio, on the day of the bank robbery and consisted of three narcotics prescriptions which he allegedly had filled at different drug stores in Columbus that day. However, the proprietor of one of the drug stores had testified at the trial that his records showed that such a prescription had been

filled at his store on that date. (See p. 4, *supra*.) Hence, the proferred evidence was merely cumulative.

Moreover, this evidence, like the testimony of the druggist who appeared as a defense witness, could with reasonable diligence have been produced at the trial. And finally, as the court below pointed out (R. 41), the evidence "could not have affected the result in view of the positive identification of appellant by a number of witnesses who saw him engaged in the robbery."

3. Petitioner's final contention is that he was denied the compulsory attendance of Grace Wendling, an inmate of Alderson reformatory, as a witness on his behalf, although he had obtained a writ of habeas corpus *ad testificandum* calling upon the warden to produce her at the trial. The testimony of one of petitioner's trial counsel at the hearing below shows, however, that the failure to call this witness was due to counsel's judgment that her testimony was not "sufficiently valuable" to warrant the expense of bringing her to the place of trial. Thus, the facts show that far from being denied the right of compulsory process for obtaining witnesses, petitioner was in fact granted that right by issuance of the writ of habeas corpus *ad testificandum* and that the witness did not appear solely because his attorney countermanded the order requiring her production.

CONCLUSION

The judgment below is correct and the case presents no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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